



Comptroller General
of the United States

826201

Washington, D.C. 20541

Decision

Matter: Centex-Great Southwest Corp.

File: B-258578

Date: January 17, 1995

Herman M. Braude, Esq., Braude & Margulies, P.C., for the protester.

Rodney L. Moss, Esq., Bradley, Arant, Rose & White, for The George Hyman Construction Company, an interested party.

George U. Lane, Esq., General Services Administration, for the agency.

Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that bid bond in an amount less than the required 20 percent of the total aggregate bid price rendered low bid nonresponsive is denied; since amount of the bid bond was greater than the difference between the low bid and the next low bid, discrepancy was waivable pursuant to Federal Acquisition Regulation § 28.101-4(c)(2).

DECISION

Centex-Great Southwest Corp. protests the proposed award of a contract to The George Hyman Construction Company under invitation for bids (IFB) No. GS-04P-94-EXC-0046, issued by the General Services Administration (GSA) for the construction of the United States Courthouse II in Tampa, Florida.

We deny the protest.

The IFB, issued on July 27, 1994, required a bid guarantee of 20 percent of the total aggregate bid. Eight bids were received at the September 16 bid opening; Hyman's was low at \$59,545,000, and Centex's was second low at \$60,116,700. Hyman submitted a bid bond in the amount of 20 percent of the bid price, but not to exceed \$3 million. Centex's bid bond was in the amount of 20 percent of the total bid (i.e., more than \$12 million). Centex argues that Hyman's bid is nonresponsive for failing to provide the full 20 percent bid bond, as required, which would be \$11,909,000 in this case.

A bid guarantee is a material part of a bid and, when required, must be furnished with the bid package. Apex Servs., Inc., 73 Comp. Gen. 81 (1994), 94-1 CPD ¶ 95. A bid that contains a bid bond that does not comply with the solicitation requirements in all material respects must be rejected, Federal Acquisition Regulation (FAR) § 14.404-2(j), unless it falls under one of the exceptions specified under FAR § 28.101-4.

Under FAR § 28.101-4(c)(2), a deficiency in the amount of a bid bond shall be waived (absent a determination by the contracting officer that doing so would not be in the government's interest) where "the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offered price and the next higher acceptable offer." See Haag Elec. and Constr., Inc., 70 Comp. Gen. 180 (1991), 91-1 CPD ¶ 29; American Roofing and Metal Co., Inc. and Port Enters., Inc., a Joint Venture, B-239457, Aug. 24, 1990, 90-2 CPD ¶ 153. Since the difference between Hyman's and Centex's bids was only \$571,700, well below the \$3 million amount of Hyman's bid bond, the discrepancy in the amount properly was waivable by the agency, and the bid therefore was responsive.

Centex asserts that it was competitively prejudiced, relative to Hyman, by its adherence to the literal terms of the solicitation, i.e., by providing a bid bond of 20 percent of its total bid. Specifically, Centex claims that its price was calculated conservatively, approximately \$1.2 million higher than it would have been otherwise, in order to prevent any likelihood of finding itself in a loss situation on the contract, in which case it would default on the bid bond and be liable to its surety in an amount up to \$13 million; had its potential liability been more limited, Centex maintains, it would have been able to bid lower.

This allegation is without merit. First, the FAR does not provide for consideration of factors such as this in determining whether a waiver is warranted; as indicated, the applicable provision provides that a discrepancy in the amount of a bid bond shall be waived unless the waiver is determined not to be in the government's interest. In any

¹The agency also argues that the amount of Hyman's bid bond was not deficient, since FAR § 28.101-2 provides that the amount of a bid bond "shall not exceed \$3 million"; the agency maintains that, although this provision was not incorporated in the IFB, Centex should be deemed to have been on notice of the limit. Given our conclusion that Hyman's bid was responsive in any case, we need not address this issue.

case, we are not persuaded that Centex was prejudiced as claimed. Centex's claimed prejudice derives from the fact that it exposed itself to a potential \$13 million liability due to the possibility that it would be required to indemnify its surety for up to that amount in the event Centex failed to accept the award. However, Centex has provided no documentation to support the \$1.2 million increase it cites, hence, we view the figure as wholly speculative. We have found such unsubstantiated claims insufficient for a necessary showing of prejudice. See Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275; American Serv. Technology, Inc., B-228881, Nov. 3, 1987, 87-2 CPD ¶ 441.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel